Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-847

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

OSCAR SIMS,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court dismiss this case where the petition for writ of certiorari was not timely filed?

2. Whether the petition for writ of certiorari states grounds which warrant this Court's review since the petition does not present a substantial federal question and does not allege a conflict between the decision below and controlling state or federal precedent?

3. Whether this Court should dismiss the petition for writ of certiorari because the questions presented are not new issues to this Court and where the Petitioner has other avenues of relief available where the alleged federal questions could be more fully developed?

PARTIES

The caption contains the names of all the parties in the court below.

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OPINIONS BELOW

1. On July 15, 1988, the Alabama Supreme Court denied Petitioner's petition for writ of certiorari, without opinion.

2. On April 12, 1988, the Alabama Court of Criminal Appeals entered an order affirming Petitioner's conviction, without an opinion.

3. Since Petitioner has reproduced these orders as Appendix A and B of the petition, Respondents have not duplicated that effort.

JURISDICTION

The Alabama Supreme Court denied Petitioner's petition for writ of certiorari on July 15, 1988. Petitioner was granted an extension of time in which to file a petition for writ of certiorari in this Court from September 13, 1988, to October 13, 1988. The petition was filed in this Court on November 21, 1988. Thus, it appears that the petition was not timely filed.

This Court has jurisdiction pursuant to 28 U.S.C. §1275(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner makes claims allegedly involving the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted in the Covington County, Alabama Circuit Court of rape in the second degree in violation of Code of Alabama 1975, §13A-6-62. Since there was no opinion below, Respondent will set forth a concise statement of facts concerning the crime from the state court transcript.

In November 1986, the Petitioner (thirty eight years old) separated from his wife and moved into a mobile home outside Florala, Alabama. (R.7,8) Petitioner's fifteen year old daughter

(Amy) and twelve year old son (Tim) remained in the home with their mother. (R.8) On November 20, 1986, Petitioner picked up his children from their house so that they could spend the night with him. (R.7-9) The Petitioner picked the children up around 11:00 p.m. and they all went to a laundromat to wash clothes. (R.9) After washing clothes, they went to Petitioner's trailer. (R.10)

Tim went to bed soon after arriving at the trailer but Amy and the Petitioner stayed up and talked. (R.10) At this time Petitioner informed Amy that he was going to marry his seventeen year old girlfriend. (R.10) Amy decided to go to bed after Petitioner told her about his marriage plans. (R.11) The Petitioner followed Amy back to the bedroom and sat on the bed talking to her. (R.12) A few

minutes later the Petitioner got into bed with Amy and put his arms around her. (R.13) The Petitioner asked Amy whether she wanted to make love. (R.14) Amy did not respond to this question. (R.14)

The Petitioner got out of the bed and went to the bathroom. (R.14) When the Petitioner came back he took his clothes off and got back in the bed with Amy and took her clothes off. (R.14-15) The Petitioner got on top of Amy and began kissing her. (R.15) The Petitioner then had sexual intercourse with his daughter. (R.15) At trial, Petitioner's daughter testified that the Petitioner "put his male parts inside of [her] female parts." (R.15) After the Petitioner finished, he told Amy not to tell anyone what had happened. (R.15) Amy was scared and just laid in the bed and did not say anything. (R.15)

The next day Amy and her brother got up and the Petitioner took them to school. (R.17) After Amy got to school she started crying and told her boyfriend what had happened. (R.17-18) The next day Amy's boyfriend persuaded her to talk to her pastor about what had happened. (R.18) The following Monday Amy told her mother what had happened. (R.19) The Petitioner was later arrested and charged with the rape of his fifteen year old daughter.

SUMMARY OF ARGUMENT

The Court should dismiss this cause because the petition was not timely filed and the Petitioner has given no reason for his failure to file in a timely manner.

Since the petition does not demonstrate that the Alabama Supreme Court's affirmance of Petitioner's conviction is in conflict with this Court's precedents and since the petition does not demonstrate that a substantial federal question is involved, this Court should not grant the writ.

The Court should also dismiss the writ because the questions presented are not new issues to this Court and no issue of national importance is presented. Further, this Court should dismiss the writ because Petitioner has other avenues of relief available where the alleged federal questions could be more fully developed.

ARGUMENT

I.

THE COURT SHOULD DISMISS THIS CASE BECAUSE THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED.

The Petitioner applies to this Court for relief from the denial on July 15, 1988, of a petition for writ of certiorari in the Alabama Supreme Court. (Petitioner's Appendix A). On September 20, 1988, this Court granted an extension of time for the filing of a petition for writ of certiorari from September 13, 1988, to October 13, 1988. The petition was not filed in this Court until November 21, 1988.

Under Rule 20.1 petitions for writ of certiorari must be filed within sixty days of the entry of judgment below. Rule 20.1 further provides that a Justice of this Court, for good cause shown, may

extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. In this case, the Petitioner was given an extension of time until October 13, 1988, to file a petition for writ of certiorari. The petition was not filed until November 21, 1988, therefore, it was not filed until after the extension of time had run.

The timely filing of a petition for writ of certiorari is not jurisdictional. Sanabria v. United States, 437 U.S. 54, 62 n.12 (1978). An untimely petition, however, should be accepted only for good cause shown. See Durham v. United States, 401 U.S 481 (1971). The Petitioner has presented no reason for his failure to file within the extension period allowed by this Court. The Court, accordingly, should dismiss the petition on the ground of untimeliness.

II.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT STATE GROUNDS WHICH WARRANT THIS COURT'S REVIEW SINCE THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND DOES NOT ALLEGE A CONFLICT BETWEEN THE DECISION BELOW AND CONTROLLING STATE OR FEDERAL PRECEDENT.

The two issues raised by Petitioner, limiting cross-examination of the victim and ineffective assistance of counsel, do not merit review by this Court because neither of them come within the perview of this Court's Rule Seventeen. In fact, no Rule Seventeen grounds have been stated in the petition.

The Petitioner's first assertion is that the Supreme Court of Alabama erred in affirming his conviction based upon the trial court's abuse of discretion by severely limiting defense counsel's cross-examination of the alleged victim. The Petitioner contends that he was

effectively precluded from cross-examining the prosecutrix as to a possible bias, interest or motive for providing false testimony. The Petitioner asserts that the failure to allow such questioning denied him of his right to present to the jury a clear and concise picture of the facts and circumstances surrounding this case thus depriving the jury of essential information necessary for a fair and accurate deliberation in this cause.

The Petitioner never presented a substantial federal question to the court's below and he is therefore precluded from attempting to raise a federal question to this Court. Although Petitioner asserted in the court's below that his right to a thorough and sifting cross-examination under the Sixth Amendment had been violated, the Petitioner relied on Alabama statutory law

(§12-21-137, Code of Alabama 1975) and Alabama case law to make this argument. (Appendix A) The Petitioner never set forth any federal cases to support his argument and never set forth facts supporting a constitutional argument. The first time Petitioner relied on federal cases was in his petition for writ of certiorari filed in this Court. The state courts have never decided an important question of federal law in this case, therefore, Petitioner has not set forth a Rule Seventeen ground for review.

The Petitioner's second assertion is that he was denied effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights. The Petitioner relies on Zuck v. State, 588 F.2d 436 (11th Cir. 1979) and Strickland v. Washington, 466 U.S. 668 (1984) to make this argument. The Petitioner contends

that the Alabama Supreme Court failed to properly examine his claim that he was denied effective assistance of counsel in the trial court under the parameters of Zuck v. State and Strickland v. Washington.

In essence, the petition asserts that the Alabama Supreme Court erred in its application of settled precedents to the facts of this case. As such, the petition fails to demonstrate that the lower court's affirmance of Petitioner's conviction is in conflict with this Court's settled precedents. Thus, there is no conflict under Rule Seventeen for this Court to review.

This ineffective assistance of counsel claim is due to be analyzed in the context of this Court's holding in Strickland v. Washington, 466 U.S. 688 (1984) and not, as the Petitioner asserts, under the exacting scrutiny standard of

the Eleventh Circuit Court of Appeals in Zuck v. State, 588 F.2d 436 (11th Cir. 1979). In Strickland v. Washington, this Court established standards required to be followed before a claim of ineffective assistance of counsel can be proven. There must first be a finding that acts or omissions of counsel amounted to actual ineffective assistance, this Court stated:

> "The convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the

> same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Secondly, in order to constitute a violation of Petitioner's Sixth Amendment right to effective counsel, a showing of prejudice must be made.

> "The defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

The determination of whether counsel was ineffective must be based on the totality of the circumstances and the entire record. Strickland v. Washington, supra; Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir.Unit B, 1981), cert denied, 456 U.S. 1011 (1982).

In this case, Petitioner contends that his trial counsel failed to file sufficient and adequate pre-trial motions, failed to request a directed verdict, failed to request adequate and necessary jury charges, failed to make timely objection to the jury instruction, failed to make appropriate objection to usage of the word "rape", failed to make an offer of proof in connection with the limited cross-examination of the prosecutrix, and filed an inadequate brief on appeal. Respondent submits that Petitioner's allegations are without merit. Most of the matters objected to by Petitioner are matters of trial strategy and, as this Court is aware, matters of trial strategy are properly left to the judgment of the trial counsel and will support a reversal only where there is a clear showing of inadequate representation. Strickland,

supra; Sinclair v. Washington, 814 F.2d 1516 (11th Cir. 1987). There has been no such showing by Petitioner in the present case. Further, Respondent submits that none of Petitioner's allegations which amount to pure conjecture of what trial counsel could have done amount to "actual ineffectiveness." The Petitioner has also failed to show that "but for" the alleged errors there is even a reasonable probability that the outcome would have been different. Even if trial counsel had pursued all of the avenues suggested in the petition such would not have been enough to "undermine confidence in the outcome of the proceeding." Therefore, this Court should deny the petition.

III.

THIS COURT SHOULD DISMISS THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE QUESTIONS PRESENTED ARE NOT NEW ISSUES TO THIS COURT AND WHERE THE PETITIONER HAS OTHER AVENUES OF RELIEF AVAILABLE WHERE THE ALLEGED FEDERAL QUESTIONS COULD BE MORE FULLY DEVELOPED.

The two issues raised by Petitioner are not new issues to this Court and since the petition does not request this Court to overrule or modify well settled law in these areas, the petition amounts to nothing more than a request to correct perceived errors of the application of facts to settled law. Given this Court's limited time and resources, this Court should refuse to grant the writ in a case such as this one where no issue of national importance is presented, where no request is made to overrule or modify this Court's precedents, and where this Court

will be required to review the trial transcript since there were no opinions rendered by the Court's below.

Further, this Court should dismiss this petition so that Petitioner can pursue other avenues of relief available to him in order to more fully develop the alleged federal questions. In this case, there are no opinions below for this Court to consider because the Alabama Supreme Court denied the Petitioner's petition for writ of certiorari without opinion and the Alabama Court of Criminal Appeals affirmed the conviction without opinion. Should this Court grant the petition for certiorari in this case, it would have to go to the trial transcript to determine the merits of the questions presented. It would be more expedient for this Court to dismiss the petition and allow the

Petitioner to file a 42 U.S.C. §2254(b) action and have the lower federal courts develop a record and determine whether the Petitioner has presented federal questions for this Court to consider. This would give this Court opinions to reach its decision from rather than take this Court's time and effort to search through a state trial transcript. Therefore, this Court should dismiss the petition for writ of certiorari.

CONCLUSION

Respondents respectfully submit that this Court should dismiss the petition for writ of certiorari. Since the petition was not timely filed, since Petitioner does not assert that the lower court applied incorrect legal standards to the facts of his case, since Petitioner is not asking the court to overrule or modify any of this Court's precedents, and since Petitioner has other avenues of relief available to him, this Court should deny the petition.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

APPENDIX

APPENDIX A

PETITIONER'S ARGUMENT IN BRIEF FILED ON DIRECT APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS THAT THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE ALLEGED VICTIM.

ISSUEI: THE TRIAL COURT ERRED TO REVERSAL BY UNILATERALLY DENYING THE APPELLANT HIS RIGHT TO A THOROUGH AND SIFTING CROSS EXAMINATION OF THE STATE'S WITNESS.

Oscar Sims, the appellant herein, respecfully urges that the court below erred to reversal based upon its failure to allow him to conduct a thorough and sifting cross examination of the State's witness. This particular issue is extremely critical in this cause in that the appellant and his estranged wife were separated and in the process of obtaining a divorce when the accusations were made against him. The trial court repeatedly denied defense counsel the right to cross

examine the alleged victim in connection with the divorce proceeding and/or her feelings in connection with said proceedings. The appellant argues that the trial court abused its discretion by sustaining each and every objection entered by the State in connection with the questioning dealing with the divorce.

The Code of Alabama, Section 12-21-137, guarantees the right of a thorough and sifting cross-examination for every party as to the witnesses called against him. While certain discretion is placed in the trial judge to determine the extent of the cross-examination, such a right is fundamental and constitutional and a limitation or cut-off of same creates an extremely perilous situation. Ball v. State, 337 So.2d 31 (Ala.Crim.App.), cert.quashed, 337 So.2d 39 *Ala. 1976). Not only is this right

granted by statute but it is also guaranteed by Article I, Section 6 of the Constitution of Alabama and by the Sixth Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the United States Constitution and any limitation on its fundamental guarantee will be closely scrutinized on appeal. Hembree v. City of Birmingham, 381 So.2d 664 (Ala.Crim.App. 1980).

In the case at hand, on each occasion that defense counsel attempted to introduce evidence demonstrating the alleged victim's bias, the State objected and each objection was sustained. This pattern and practice denied the defendant his constitutional and statutory right to a thorough and sifting cross-examination of the only witness called to testify against him. A careful reading of the

record reveals that the allegations against appellant, Oscar Sims, arose once he informed his wife that he intended to divorce her and marry a younger woman. Defense counsel was repeatedly prevented from presenting to the jury the attitude of the alleged victim toward her father's contemplated marriage thus precluding defense counsel from proving the alleged victim's inherent bias in her testimony.

Further, defense counsel was overruled in his attempt to introduce prior inconsistent statements of the alleged victim based upon previous sworn testimony given at the appellant's, Oscar Sims, divorce proceeding. The transcript was marked as an Exhibit in this trial however was not made available to the jury for use in it's deliberation.

While the range and extent of cross-examination of a witness lies within

the sound discretion of the trial court the question or line of questioning must carefully be reviewed by the appellate court to determine whether an undue restriction has been applied. Weaver v. State, 407 So.2d 568 (Ala.Crim.app. 1981). In the case at hand, the cross-examination sought by the appellant was based upon exposing the bias of the State's witness, the alleged victim, and to establish the prior inconsistent statements made by the "star" witness. The consistent deprivation by the trial court of the defendant's right to present to the jury a clear and concise picture of the mindsets of the primary actors in this case denied them, the jury, a necessary piece of their fact finding puzzle.

The appellant, Oscar Sims, therefore respectfully urges that he was

prejudiced by the trial court's disallowance of testimony that was relevant and material to his defense. He was further denied the right to an adequate confrontation of the witness against him and an opportunity to expose that witness' bias and prejudice. For the foregoing reasons, Oscar Sims urges that this cause be reversed and remanded for a new trial.

CERTIFICATE OF SERVICE

I, P. David Bjurberg, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve the requisite number of copies of this brief on the attorney for the Petitioner by placing a copy in the United States mail, postage prepaid, and addressed as follows:

Hon. Lynn E. Quinley
Post Office Box 967
Daphne, Alabama 36526

This _____ day of February, 1989.

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